ORIGINAL

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EX PARTE OR LATE FILED

November 16, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Notice — CC Docket No. 98-147

Dear Ms. Salas:

On November 10, 1999, on behalf of CoreComm, and prior to the release of the Sunshine Agenda for the open meeting on November 18, I spoke with Sonja Rifken of the Office of General Counsel concerning the proposed creation of a line-sharing UNE. In the course of the conversation, I discussed only the issues presented in a letter to Dorothy Attwood, which my colleague, Jim Valentino, sent to you on November 10 for inclusion in the public record of CC Docket No. 98-147.

My understanding of the Commission's rules (specifically 47 C.F.R. Section 1.1206(b)(2)) is that no report of the ex parte communication is required because I adhered closely to the facts and arguments already placed on the public record. Nonetheless, after checking with Ms. Rifken, I have ascertained that she would prefer that a report of our communication be filed in the record.

An original and one copy of this memorandum and of the materials discussed during the telephone call are being filed with your office. Please contact me if you have any questions.

Respectfully submitted,

James L. Casserly

Attachment
cc: Sonja Rifken

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November 9, 1999

Dorothy Attwood
Legal Advisor to Chairman Kennard
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Proposed Line-Sharing UNE, CC Docket 98-147*

Dear Ms. Attwood:

As you know, CoreComm has discussed the Commission's proposal for a new "line-sharing" UNE with the Common Carrier Bureau and with the Commissioners' common carrier advisors. The discussions to date have not altered CoreComm's view that this proposal for a custom-tailored UNE is deficient on both legal and policy grounds. If anything, CoreComm's misgivings have grown.

It is perfectly understandable that the Commission wishes to vigorously pursue measures that it believes will promote investment and innovation in advanced telecommunications services. Despite the importance of this goal, however, the Commission must be careful to temper its enthusiasm for "broadband" with due regard for its other statutory responsibilities. In particular, the Commission's desire to further stimulate the already substantial success of the "DSL CLECs" ought not to be pursued in a manner that undermines telecommunications competition or jeopardizes the interests of telephone subscribers. For the reasons discussed below, CoreComm believes a line-sharing UNE will discourage facilities-based competition and shortchange the interests of telephone ratepayers.

1. In the discussions to date, CoreComm has been unable to obtain an explanation of how facilities-based competition for voice services and for bundles of services can be advanced if one discrete (and possibly transitory) class of competitors can obtain access to frequency-divided loop capabilities without paying for use of a full unbundled loop. It is difficult to see why the Commission would expect CLECs to construct their own loop facilities or to procure unbundled ILEC loops if a rival can offer both voice and high-speed data services over the same loop but without having to pay the full TELRIC price of that loop.[1/]

[1/] The DSL CLECs have generally emphasized in this proceeding their interest in providing high-speed data services and nothing but high-speed data services. But statements to potential

The dangers to competition would be particularly acute if, as we understand, the line-sharing UNE will be available to the DSL CLEC only so long as the end-user remains a POTS subscriber of the ILEC. Under this scenario, DSL CLECs will have an unfair competitive advantage over CLECs offering voice services only and CLECs offering bundles of services. It will not be sufficient for CLECs to persuade the end-user to abandon either the ILEC or the DSL CLEC; only a decision to abandon both will serve. And both the ILEC and the DSL CLEC will have a shared interest in perpetuating the end-user's existing service arrangements, thereby hindering competition from facilities-based providers.

2. Equally troubling is the Commission's apparent failure to work through the ratemaking consequences of the proposed line-sharing UNE. ILEC investment in telephone plant is flowed through the Uniform System of Accounts (Part 32), the Joint Cost rules (Part 64), and jurisdictional separations (Part 36) before it affects intra- and interstate rates. The Commission's Notice of Proposed Rulemaking offered no insights as to how any of these rules might need to be changed as a consequence of adopting a line-sharing UNE.[2/] In our discussions to date it appears that, while the Commission now is aware of this issue, it has not yet analyzed how a line-sharing UNE could be reconciled with the Commission's other statutory responsibilities.

How can the Commission protect the interests of telephone ratepayers in receiving affordable, basic telephone service without knowing whether one consequence of the proposed line-sharing UNE will be to complicate, and perhaps hinder, the recovery of investment that is assigned to the intrastate jurisdiction? Given the demonstrated proclivities of the ILECs to sue for "takings" that they claim result from regulatory action, the FCC has a duty to satisfy itself that telephone companies will not be able to manipulate recorded investment and revenue requirements in ways that adversely affect the rates for, or quality of, basic telephone service. Failure to address these issues will necessarily frustrate the statutory requirement that the FCC and the states "establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that *services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.*" 47 U.S.C. § 254(k) (emphasis added).

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customers and to the financial community, as well as articles in the trade press, tell a different story. As the attached documents indicate, voice services are very much in the immediate plans of the DSL CLECs.

[2/] The analysis of these issues may vary depending on whether the DSL CLECs are offering high-speed data services only or voice services as well. See n.1 supra. The Commission needs to consider *both* sets of possibilities in whatever order it adopts in this proceeding.

3. Another area of continuing concern relates to the legal standard for creation of unbundled network elements. The one aspect of the Commission's local competition decision that the Supreme Court reversed involved the standards under which the unbundling obligations of Section 251(c)(3) are determined. The Court viewed the Commission as having been too cavalier in its approach to Section 251(d)(2) and therefore directed the Commission to give meaning to the "necessary" and "impair" clauses. Now that the Commission's UNE Remand Order is available, it appears that the case for a custom-tailored line-sharing UNE is weaker than ever.

Assuming that there are likely no "proprietary" considerations in line sharing, the Commission would apply the "impair" standard of section 251(d)(2)(B), rather than the "necessary" standard of Section 251(d)(2)(A), to determine whether to unbundle the high-frequency portion of the loop. The record in this proceeding does not support a finding that lack of access to a line-sharing UNE impairs, or materially diminishes, a DSL CLEC's ability to provide competitive services to customers. On the contrary, as the Commission has recently observed, the DSL CLECs have experienced tremendous growth and are aggressively deploying advanced services such as xDSL across the country. See Implementations of the Local Competitive Provisions of the Telecommunications Act of 1996, Third Report and Order, at ¶ 307 ("UNE Remand Order").

Of course, DSL CLECs would likely argue that any Commission failure to unbundle line sharing constitutes an "impairment" because it would materially raise their entry costs, delay broad-based entry, and limit the scope and quality of their service offerings. As support for their claim, they will likely cite to the Commission's statement in the UNE Remand Order that, absent line sharing, a DSL CLEC would incur "additional non-trivial costs" because they "must purchase an *additional* unbundled loop to serve their customers" with xDSL service. See UNE Remand Order at ¶ 310 (emphasis added). CoreComm maintains, however, that this statement is demonstrably false. Like facilities-based providers of integrated services, DSL CLECs are free to provide their services over the *primary* loop serving the customer, provisioned as a UNE. They have the opportunity to earn multiple revenue streams, including access charges, local voice and toll charges, and charges for data traffic, and if they choose not to provide all of these services they are free to partner with others who do.[3/]

Thus, absent this false premise, the determination of whether line sharing should be unbundled is no different than the Commission's analysis of DSLAMs and packet switches, as to which the Commission decided *not* to create new UNEs. In concluding that DSLAMs and

[3/] Again, it bears emphasis that DSL CLECs are positioning themselves to provide an integrated package of services, including voice, making their reluctance to assume responsibility for a whole loop all the more unsustainable.

packet switches should generally not be unbundled, the Commission noted that the presence of "multiple requesting carriers providing service with their own packet switches is probative of whether they are impaired without access to unbundled packet switching." UNE Remand Order at ¶ 306. While the Commission concluded that competitors may be impaired in their ability to serve certain segments of the market, namely residential and small business, the Commission opted not to order unbundling of DSLAMs and packet switches given the "nascent nature of the advanced services marketplace." Id. The same statements could well be made about a frequency-sharing UNE.

In addition to the "necessary" and "impair" standard, the Commission has concluded that it may consider how the UNEs it adopts will further the goals of the 1996 Act "to open the local exchange and exchange access markets to competition and to promote innovation and investment by all participants in the telecommunications marketplace." UNE Remand Order at ¶¶ 2, 103 (citing Joint Explanatory Statement at 1). CoreComm fails see how the Commission's proposed line-sharing UNE, which benefits DSL CLECs at the expense of facilities-based competition for voice services, comports with these goals. Indeed, unlike access to unbundled subloop elements discussed in the UNE Remand Order, a line-sharing UNE increases, not reduces, reliance on the incumbent and discourages competitors from deploying their own loop facilities.

We appreciate the opportunity to participate in the Commission's continuing consideration of these issues. Thank you in advance for considering the foregoing points. Please feel free to call if you believe further discussions would be useful.

Sincerely,

James L. Casserly

James J. Valentino

cc: Linda Kinney
Rebecca Beynon
Kyle Dixon
Sarah Whitesell
Larry Strickling
Carol Mattey
Staci Pies
Margaret Egler
Vincent Paladini
Sonja Rifken

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